

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1395

Rec'd
10/21/77
JLC

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

VINCENT ANGELINA,

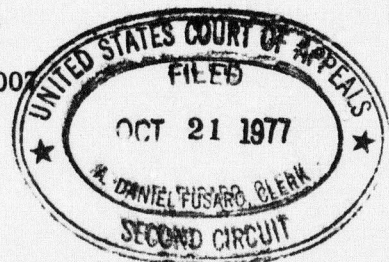
Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

BRIEF FOR THE APPELLANT VINCENT ANGELINA

B
R/S

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

VINCENT ANGELINA

Appellant.

- - - - - X

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE APPELLANT
VINCENT ANGELINA

QUESTIONS PRESENTED

1. Did the Assistant United States Attorney in charge of the prosecution of Mr. Angelina breach the plea bargain reached among the parties when, contrary to a promise not to influence the court on sentencing, the Assistant U.S. Attorney gave information to the probation officer which, to the prejudice of Mr. Angelina wound up in the presentence report prepared for Judge Griesa on the day he sentenced Mr. Angelina.

2. Does the breach of the plea bargain entitle Mr. Angelina to vacatur of his guilty plea and sentence?

PRELIMINARY STATEMENT

Vincent Angelina appeals from a judgment of the United States District Court, Southern District of New York,

rendered July 22, 1977 (Griesa, J.), convicting him after a guilty plea of sale of a Schedule I controlled substance in violation of 21 USC Sections 12, 841(a)(1) and 841 (b)(1)(B) and sentencing him to the care and custody of the Attorney General of the United States for a period of one year followed by two years special parole.

The appellant is not currently incarcerated pursuant to that sentence.

STATEMENT OF FACTS

On June 6, 1977, pursuant to a negotiated plea bargain, Mr. Angelina pleaded guilty to violation of 21 U.S.C. Sec. 812, 841(a)(1) and 841(b)(1)(B).

In return for his plea, the Assistant United States Attorney agreed not to oppose a motion to dismiss 2 counts at sentencing and further agreed not to try to influence the court at sentencing.

Contrary to this agreement the Assistant United States Attorney gave detrimental information to the probation officer. This information appeared in the presentence report presented to Judge Griesa, the sentencing judge, and was attributed to the Assistant United States Attorney who had negotiated the plea. (Appendix motion to set aside conviction, page 1).

At sentencing, Mr. Angelina's then attorney of record, ENID GERLING raised this point, denied the allegations on Mr. Angelina's behalf and stated that "no weight" should be given to the information.

The court then stated "it will not" give any weight to the allegations, but then continued:

"The thing is that he has pleaded to a particular crime and that's the crime I am considering. The circumstances of that crime are very important for me to consider to see whether this is a single situation or whether it is as in some other character. I will say on both sides that I cannot consider for sentencing evidence that I don't have. I will just not consider tapes that I haven't heard and so forth." (Appendix: Minutes of the sentencing hearing, July 11, 1977, pp. 2, lines 24-25, pp. 3, lines 2-7).

Almost immediately thereafter, ENID GERLING filed a motion to set aside the conviction (see Appendix) relying primarily on the breach of the plea bargain occasioned by Assistant U.S. Attorney Gold's revelations to the probation officer. This motion was denied by endorsement on August 8, 1977 by Judge Griesa.

On August 9, 1977, my office filed a Notice of Appeal to the Second Circuit, appealing the denial of Mr. Angelina's motions to withdraw his plea and to set aside the sentence.

ARGUMENT

POINT I

THE ASSISTANT UNITED STATES ATTORNEY IN CHARGE OF THE PROSECUTION OF MR. ANGELINA BREACHED THE PLEA BARGAIN REACHED BETWEEN THE GOVERNMENT AND MR. ANGELINA WHEN THE ASSISTANT U.S. ATTORNEY GAVE INFORMATION TO THE PROBATION OFFICER FOR USE IN THE PRESENTENCE REPORT THAT MR. ANGELINA HAD BEEN TRAFFICKING IN NARCOTICS FOR 10 YEARS. THIS WAS CONTRARY TO THE AGREEMENT THAT THE U.S. ATTORNEY WOULD NOT TRY TO INFLUENCE THE COURT ON SENTENCING.

The Assistant United States Attorney breached the negotiated plea bargain by supplying unsubstantiated information to the federal probation officer which later appeared in the

pre-sentence report prepared for Judge Griesa.

ENID GERLING who represented Mr. Angelina throughout the period of negotiations first raised the spectre that the plea bargain was breached at the time of Mr. Angelina's sentencing:

"One thing I will say is that Ms. Gold--in the probation report, there is a statement by Ms. Gold saying that she could prove that Mr. Angelina has been trafficking in drugs for ten years. This is an unsubstantiated statement, Judge, and Mr. Angelina denies the allegation." (Appendix: minutes of the sentencing hearing, July 22, 1977, page 2, lines 13-17).

Shortly, thereafter, Ms. Gerling filed a motion to set aside the conviction. In these papers, Ms. Gerling outlined the nature of the plea bargain and the manner in which it was breached:

"1. That the United States Attorney assured him that if he took a plea she would do nothing to influence the court on his sentence. Contrary to her word she gave certain facts to the probation officer which were detrimental to his report and which definitely must have had an influence on the court.

2. The Probation Officer included in his report factors about the case which were a question of fact and should not have been placed before the court in a determination of sentence. These facts had not substantial proof and were based on hearsay and the opinion of the United States Attorney, and the Probation Officer. (Appendix: Motion to set aside the conviction, pp. 1).

Regardless of the accuracy of the Assistant United States Attorney's assertions to the probation officer, and regardless of the extent to which these assertions were relied upon by the sentencing judge, the clearly enunciated law of the land with respect to plea bargains is that "when a guilty plea

rests in significant degree on a promise of the prosecution so that it could be said to be part of the inducement, such promise must be fulfilled." If not, the promise must be considered breached. Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d. 427, 433 (1971).

Here, as in Santobello, Mr. Angelina negotiated for a particular plea in order to secure dismissal of more serious charges but also on condition that no sentence recommendation would be made by the prosecutor. While the Assistant United States Attorney present at the time of sentencing made no verbal recommendation in open court at that time, it is impossible to avoid the conclusion that the government had already tried to influence the court on sentencing by its representations passed on to the court through the route of the presentence report.

These representations must be viewed as bearing on the ultimate sentence imposed. To deny this effect is to assert that the preparation of the contents of the presentence report is a meaningless formality.

This latter conclusion flies in the face of experience. As this court had the opportunity to observe in a recent case involving the contents of presentence reports, "Experience has shown that they are heavily relied upon by sentencing judges." United State v. Robin, 545 F2d 775, 780 (2C 1976), rehearing denied 553 F2d 8 (2C. 1977).

The Assistant United States Attorney who negotiated the

plea did not bother to appear at the sentencing. In effect, she had made the government's view point known to the court through the presentence report. Her statements, contained in this report and attributed to her stood in lieu of any verbal in-court statement she may have agreed to "waive" during plea negotiations.

However, the effect of this was no less than if made orally by the U.S. Attorney at sentencing. Ceremoniously, the Assistant U.S. Attorney present at sentencing (Ms. Parver) stood mute.

POINT II

AS A RESULT OF THE BREACH OF THE PLEA BARGAIN, THE GUILTY PLEA SHOULD BE VACATED

As this circuit has recognized in cases involving allegations of breaches of plea bargains, the guiding analysis is the Supreme Court's recognition of plea bargaining as "an essential component of the administration of justice. Properly administered it is to be encouraged" Santobello 404 US at 260. However, the plea bargaining process must be "attended by safeguards to insure the defendant what is reasonably due in the circumstances." 404 U.S. at 262. Palermo v. Warden of Green Haven State Prison, 545 F2d 286 (2C 1976).

In the case at hand, by pleading guilty, Mr. Angelina gave up numerous constitutional rights including that of contesting charges made against him and confronting witnesses. See:

United State v. Saft, 558 F.2d 1073, 1077 (2C 1977) Fed. R. Crim P. 11(c).

In exchange for his plea, the Assistant U.S. Attorney was to abstain from trying to influence the court at sentencing, and would not oppose a defense motion to dismiss two counts of the three count indictment at sentencing.

Santobello established that "when a plea rests in any significant degree on a promise or agreement of the prosecution, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 US at 262. In Palermo this circuit construed Santobello's holding as "resting on principles of fairness in securing such an agreement and the adjudicative element inherent in accepting a plea. Santobello focused on an 'appropriate recognition of the duties of the prosecutor in relation to promises made' in plea negotiations. Neither the inadvertence of the breach nor its possibly harmless effect* obviated the need for ... appropriate relief." 545 f2d at 295-296.

The principle of Santobello, that relief is required when a prosecutor fails to fulfill promises within his power in negotiating a plea bargain is so basic that further reference to it, or citations to cases construing it are unnecessary.

Simple fairness dictates that the government, having

*The sentencing judge stated that he had not been influenced by the prosecutor's recommendations.

failed to live up to its part of the plea bargain by attempting to influence the court, cannot now argue that Mr. Angelina cannot withdraw his plea. If Mr. Angelina is to be held to his promise to plead guilty, he is entitled to have the government live up to its promises and not seek to subvert the plea bargain by channeling a recommendation or any other information which might affect the sentence to the court.

Furthermore, fundamental fairness and public confidence in government officials require that prosecutors be held to "meticulous standards of both promise and performance Correale v. U.S. 479 f2d 944, 947 (1C, 1973) cited in Palermo 545 f2d at 296.

This court has recognized that the possible remedies for prosecutorial breach are either specific performance of the agreement or vacatur of the plea, the choice to be a discretionary one guided by the circumstances of each case. Palermo at 545 f2d 217; United States v. Santobello, 404 US at 263.

Under the present circumstances, it is entirely appropriate for vacatur of the plea and a return of this case to pre-trial status.

CONCLUSION

For the reasons stated, this court vacate the guilty plea and sentence below.

Respectfully submitted,

MEL A SACHS

SACHS b&app

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 21 day of Oct. 1977 deponent served the within *BRIEF* upon

U.S. Atty. So. Dist. of N.Y.

attorney(s) for

Appellee

In this action, at

1 St. Andrews Pl., NYC

the address(es) designated by said attorney(s) for that purpose by depositing _____ copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this 21 day
of Oct. , 1977

William Batley
WILLIAM BATLEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

COPY RECEIVED
ROBERT B. FISKE JR.
OCT 21 1977
U. S. ATTORNEY
SO. DIST. OF N. Y.